

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

ROBERT EARL LEATHERBERRY,

Case No. 18-CV-1987 (DSD/DTS)

Petitioner,

v.

REPORT AND RECOMMENDATION

JEFF TITUS, Warden,

Respondent.

In an order dated July 26, 2018, this Court noted that petitioner Robert Earl Leatherberry had filed a “mixed” petition for a writ of habeas corpus — that is, a petition that included claims that were both exhausted and unexhausted in the state courts. *See* ECF No. 2. Specifically, although two of the claims raised in the petition had been presented to the state courts, Leatherberry had not yet prosecuted his claim of ineffective assistance of appellate counsel. Federal district courts “may not adjudicate mixed petitions for habeas corpus, that is, petitions containing both exhausted and unexhausted claims.” *Rhines v. Weber*, 544 U.S. 269, 273 (2005) (citing *Rose v. Lundy*, 455 U.S. 509 (1982)); *accord* 28 U.S.C. § 2254(b).

This Court gave Leatherberry two options. First, Leatherberry could voluntarily dismiss his entire habeas petition, go to state court to prosecute his ineffective assistance of appellate counsel claim, then return to federal court to prosecute each of the grounds for relief presented in his habeas petition. Second, Leatherberry could voluntarily dismiss only the ineffective assistance of appellate counsel claim, likely forfeit any

possibility of later federal habeas review on that claim, *see* 28 U.S.C. § 2244(b), and elect to proceed in this action with the two remaining grounds for relief.¹ Leatherberry was given 20 days in which to make his selection, failing which this Court would choose the first option and recommend dismissal of the entire petition without prejudice due to it being a mixed petition.

That deadline has now passed, and Leatherberry has not responded to this Court's prior order. Therefore, consistent with that order, it is now recommended that Leatherberry's habeas corpus petition be dismissed without prejudice.

RECOMMENDATION

Based on the foregoing, and on all of the files, records, and proceedings herein, IT IS HEREBY RECOMMENDED that the petition for a writ of habeas corpus of petitioner Robert Earl Leatherberry [ECF No. 1] be DISMISSED WITHOUT PREJUDICE for failure to fully exhaust state remedies.

Dated: September 13, 2018

s/ David T. Schultz

David T. Schultz

United States Magistrate Judge

¹ This Court considered and rejected a stay of these proceedings pursuant to *Rhines*, because Leatherberry had not shown good cause to enter such a stay and because Leatherberry was unlikely to suffer any prejudice should this matter be dismissed without prejudice as a mixed petition, as Leatherberry had time enough under the relevant statute of limitations to prosecute the state-court action and return to federal court. *See* 28 U.S.C. § 2244(d).

NOTICE

Filing Objections: This Report and Recommendation is not an order or judgment of the District Court and is therefore not appealable directly to the Eighth Circuit Court of Appeals.

Under Local Rule 72.2(b)(1), “a party may file and serve specific written objections to a magistrate judge’s proposed finding and recommendations within 14 days after being served a copy” of the Report and Recommendation. A party may respond to those objections within 14 days after being served a copy of the objections. *See* Local Rule 72.2(b)(2). All objections and responses must comply with the word or line limits set forth in Local Rule 72.2(c).